No. 86-1559

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDDIE BURRELL, et al.,
APPELLANTS

v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, et al.,
APPELLEES

On Appeal from the United States District Court for the Southern District of Mississippi

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM OR DISMISS

This brief is filed, pursuant to this Court's Rule 16.5, in opposition to the Motion to Affirm or Dismiss previously filed in this cause by the appellees, William A. Allain, et al., hereinafter referred to as "the State".

I. THE DISTRICT COURT EXERCISED NO DISCRETION,BUT EXPRESSLY PREDICATED DENIAL OF §5 RELIEF ON THE PLAINTIFFS' FAILURE TO PROVE DISCRIMINATION.

The State would have this Court believe that the judgment below can be reversed only if the District Court "has no discretion to fashion any remedy except to enjoin or set aside an election conducted" in violation of §5. Mtn. at 5. This misconstruction of the appellants' position is easily refuted by the briefest examination of the statement of the first question presented. The District Court's judgment was fatally tainted by its conclusion that the plaintiffs should be required to prove racial discrimination as a prerequisite to relief. Because of that error, the judgment cannot stand.[1]

This Court made plain only two years ago that "[t]he determination of whether a change has a discriminatory impact or effect, which is committed by statute to the Attorney General," plays no part in the fashioning of a remedy for a violation of §5. *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 183 n.36 (1985). As long as sixteen years ago, this Court reversed this very same District Court because "the challenged changes were examined on the merits to determine whether they had 'a discriminatory purpose or effect.'" *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). Notwithstanding the clear teaching of this Court, the District Court asserted in its order denying a preliminary injunction its authority to inquire into the question of discrimination:

> Whether there has been a change ... is not determined by whether the conduct of the election has the purpose or effect of denying the right to vote on account of

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[1] The appellants, however, do not retreat from their contention that a district court which concludes that a prospective election will violate §5 has no discretion to permit that election to proceed. Jurisdictional Statement at 9-11. In determining how to act after the law has already been violated, a court may be said to exercise remedial discretion; where, as here, a court expressly authorizes an illegal act to proceed, it provides no remedy at all, but only a cloak for injustice. In none of the cases cited by the State had a district court concluded that §5 applied to a procedure but nevertheless permitted that procedure to go forward.

> race of color, but we may consider evidence bearing upon that question in fashioning our remedy. Neither party has chosen to present such evidence. The Court considers the absence of such evidence as a factor weighing in favor of the State's position that the conduct of the election should not be enjoined.

App. F at 44a.[2] The Court continued to adhere to this error after trial:

> [W]e deny any relief for the Section 5 violation as it relates to the election date change on grounds that reasons or bases for equitable relief have not been presented that are alleged to have caused an injury resulting from a violation of Section 5 which are independent of Section 2 or which are independent of the alleged constitutional violations.

App. A at 5a. Once the Court concluded that no discrimination had been proven, it did not return to the question of what relief should be ordered for the §5 violation which had been proven, but it simply dismissed the complaint altogether.

Had the Court in fact exercised discretion, it would have weighed "the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by §5." *Perkins, supra,* 400 U.S. at 396. As already noted, J.S. at 11-12, the nature of this change is permanent and irremediable. This is not a routine election of public officials which may be corrected at the next regular election. Rather, this is a special election to amend the Constitution, and it was perfectly plain to the State and the District Court that preclearance was required. *Hampton County, supra*, 470 U.S. at 182; *Garcia v. Guerra*, 744 F.2d 1159 (5th Cir. 1984).

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[2] In fact, the plaintiffs did present evidence of discrimination, in the form of an affidavit from Henry J. Kirksey, one of two black members of the Mississippi Senate. After describing the history of the challenged legislation, Senator Kirksey concluded, "Race was definitely the motivating force in the conception and passage of this legislation and I am convinced that the only reason that this legislation was passed was because Claiborne County is a predominantly black county."

Apart from the question of remedy, it is now quite clear that the District Court erred in ruling that the setting of the date for the 1982 election did not require preclearance under §5. The Justice Department's new regulations implementing §5, superseding those set out in the State's supplemental appendix, provide:

> Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement.

52 Fed. Reg. 486, 493 (1987) (to be codified at 28 C.F.R. §51.17 (b)). The State proclaims that the legislature has discretion to fix a special election date as it pleases, Mtn. at 3 n.1, and the setting of the 1982 date accordingly should have been precleared under §5. The District Court's failure to so rule requires reversal of its judgment.[3]

II. THE JUSTICE DEPARTMENT HAS RECOGNIZED THE NEED OF GUIDANCE FROM THIS COURT REGARDING REALLOCATION OF GOVERNMENTAL AUTHORITY.

There is no need for further discussion of the holdings in *Horry County v. United States*, 449 F. Supp. 990 (D.D.C. 1978), and *Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985). However, it should be noted that the State misrepresents current circumstances in suggesting that it "can now basically rely upon the Attorney General's regulations for guidance, to determine which enactments, if any, do not require advance federal review." Mtn. at 15. Even the old regulations, set forth in Supplemental Appendix A, made plain that its illustrations were not intended to be exclusive. In the preamble to its new regulations, the Justice Department expressly noted the difficulty of the *Horry County* question:

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[3] The invalidation of the 1982 election would drastically change the character of the 1986 election. In 1986 the voters thought they were faced with the question of whether or not to retain the version of §112 of the Constitution previously adopted pursuant to S.C.R. No. 519. Had the voters known that the original version of §112 was still in effect, they would have been faced in 1986 with the entirely different question of whether to retain the requirement of true equality in property taxation.

> While we agree that some reallocations of authority covered by Section 5 (e.g., implementation of "home rule"), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from non-covered reallocations to enable us to expand our list of illustrative examples in a helpful way.

52 Fed. Reg. 486, 488 (1987). This Court should note probable jurisdiction of this appeal to provide the guidance in this area which the State admits is essential and which the Justice Department admits it cannot provide.

III. THE STATE IS RESPONSIBLE UNDER SECTION 5 FOR THE FAILURE OF THE COUNTY ELECTION OFFICIALS TO PRINT H.C.R. NO. 41, IN ITS ENTIRETY, ON ALL BALLOTS.

The District Court correctly recognized that "state law [Miss. Code Ann. §23-5-141 (1972)] required that the proposed constitutional amendment be printed *in full on the ballot.*"[4] App. A at 5a (Emphasis added). The Master's Report demonstrated that §23-5-141 was not followed in at least 33 counties in the 1982 and 1986 elections. There is no support in law for the State's contention, Mtn. at 19, that the appellants should be required to prove that the State had previously complied with the law. Section 5 requires a plaintiff to prove *only* that the defendants administered an election procedure different from that "in force or effect on November 1, 1964." The requirements of §23-5-141 were in existence on November 1, 1964, and a court must "presume that officials will act in accordance with law." *Perkins, supra,* 400 U.S. at 394. If the State wished to prove that its officials had routinely violated the law for 22 years, it bore the burden of so doing.

The State contends that it is not responsible for the county election officials' failure to follow the law. This contention is contrary to the general principles of agency law and the specific holdings of prior election cases. A state may not hide behind the

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[4] The Court thus rejected the State's claim that election officials were not required to print the full text. Mtn. at 20-21 & n.17. The requirement is made applicable to voting machines and electronic voting machines by Miss. Code Ann. §§23-7-21 and -309 (1972). There is no reason for this Court to disturb the District Court's construction of Mississippi law.

wrongful acts of an agent acting under the state's authority. "States cannot avoid §5 responsibilities by delegating them to political parties." *South Carolina v. United States,* 585 F. Supp. 418, 424 (D.S.C. 1984). The county election commission takes the character of a state agency from the duties imposed by state statutes. *Smith v. Allwright,* 321 U.S. 649, 663 (1944). Indeed, this same District Court has specifically recognized that county and municipal registrars and election officials act as the State's agents. *United States v. Mississippi,* 256 F. Supp. 344, 349 (S.D. Miss. 1966). Plainly, the State is responsible for the §5 violations of law by any of its election officials.

IV. ALTHOUGH INDIVIDUAL PLAINTIFFS CAMPAIGNED IN THE REFERENDUM, THE INABILITY OF THE BOARD TO MOUNT A COLLECTIVE CAMPAIGN WAS THE RESULT OF PAST AND PRESENT DISCRIMINATION.

The appellants reiterate that the District Court erred in focusing on their own campaign activity instead of equal access of black voters to information regarding H.C.R. No. 41. As earlier demonstrated, J.S. at 21-22, it is plain that H.C.R. No. 41 became less popular as more information became available. The decision to truncate the campaign period indisputably strangled the flow of information to the electorate. Since the testimony is undisputed that more time is necessary to educate and organize black voters than white voters, the deprivation of information unquestionably had a discriminatory effect upon the black electorate.[5]

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[5] The record indisputably reflects that white voters were better able to obtain information for themselves, based upon their more extensive resources and political experience. This was dramatically demonstrated by the testimony of Stone Barefield, attorney for the Board of Supervisors in Forrest County, who first took his seat in the Mississippi House of Representatives in 1960, long before most blacks could vote. Through the use of his county's computer, he was able to demonstrate that taxes would only be reduced on homes valued at $70,000 or above. By taking these facts to the local newspaper and television station, the Forrest County Board was able to defeat H.C.R. No. 41 at home and in the adjoining counties. Trial transcript at 361-69. Because black counties lack the sort of expertise and resources which Mr. Barefield had acquired during twenty-six years of political experience in his county, this sort of information was not made available in black areas before the June election.

In dwelling upon the supposed conduct of the plaintiffs, the District Court simply asked the wrong question.[6]

The suggestion that there was no campaign by these plaintiffs simply is not supported by the record. Supervisor Butler testified that he and another supervisor worked extensively with the N.A.A.C.P. and local ministers within Claiborne County. Trial transcript at 257-60. The District Court expressly acknowledged Butler's testimony that he had contacted black leaders outside the county. Compare App. A at 27a with trial transcript at 276-80. The Court disregarded these efforts because the full Board of Supervisors did not mount a coordinated and collective campaign. The rationale of the opinion is drawn entirely from the Court's own leading questions from the bench:

> JUDGE JOLLY: Did the majority of the Board say that "The best thing to do is to fight this in the courts because we can't win it at the election"?
>
> A. Yes. Yes.
>
> JUDGE JOLLY: And that was the conclusion of the Board.
>
> A. That was the conclusion of the Board.

Trial transcript at 292.

What the District Court failed to acknowledge was that this certitude of defeat was the result of the very discriminatory conduct which was challenged in the complaint. Supervisor Butler later explained why the majority of the Board felt they would lose the referendum:

> [T]hey felt that in order to really — well, in order to really get out there and let people know or get advice on what to do, you know, to bring it to the attention of groups like the — let's say the supervisors' association, you really have to sit down and discuss the ramifications of it in reference to each individual county; and this takes time.

Trial transcript at 303-04. Had the State given the plaintiffs seven months instead of seven weeks to discover and discuss those

[6] Aside from the District Court's mistakes of legal analysis, many of its recitations of supposed facts are clearly erroneous on this record. See J.S. at 17 nn.15-16, 19 n.19.

ramifications, the outcome could have been entirely different.

In one obviously misprinted footnote, Mtn. at 22 n.18, the State seems to be renewing its attack upon the plaintiffs' standing to bring this litigation. The Justice Department's regulations make plain that the Voting Rights Act protects the right to campaign, as well as the right to vote. The list of examples includes:

> Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5.

52 Fed. Reg. 486, 492 (1987) (to be codified at 28 C.F.R. 51.13(k)). The record in this case plainly reflects that this personal right of the plaintiffs was violated, and they indisputably have standing to assert the violations of their own rights.

V. THIS COURT HAS JURISDICTION TO RESOLVE THE QUESTIONS OF LEGISLATIVE PURPOSE PRESENTED BY THE JURISDICTIONAL STATEMENT.

The District Court held that the Tax Injunction Act, 28 U.S.C. §1341, deprived it of jurisdiction over the appellants' constitutional claims. App. A at 16a. Albeit without explanation, the Court necessarily concluded, in the words of §1341, that the appellants' complaint sought to enjoin "the assessment, levy or collection" of a state tax and that "a plain, speedy and efficient remedy" existed in the courts of Mississippi. As the appellants have previously argued, J.S. at 28 n.34, these unexplained conclusions are plainly incorrect.[3]

The inability of state authorities to consider federal claims has previously led to the rejection of defenses based on §1341. In *Township of Hillsborough v. Cromwell,* 326 U.S. 620 (1946), New Jersey authorities argued that their law afforded a sufficient remedy to the protesting taxpayer. This Court, however,

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[3] The District Court also held that §1341 did not bar consideration of appellants' claims under the Voting Rights Act, App. G at 47a, and the State does not challenge this indisputable conclusion. As the appellants earlier explained, J.S. at 23 n.25, their claims of intentional discrimination are cognizable under §2 of the Voting Rights Act. Accordingly, even if the District Court properly dismissed the constitutional claims, this Court must still resolve the fifth question presented by the Jurisdictional Statement.

rejected that argument, noting that "the State Board of Tax Appeals to which respondent might have appealed concededly has no right to pass on constitutional questions." *Id.*, at 625. The only statutory proceeding available to the appellants in Mississippi involves a hearing before the appellee State Tax Commission pursuant to Miss. Code Ann. §§27-35-309 and -311 (1972). The appellants duly sought such a hearing, but the Commission refused to grant one, citing its inability to resolve constitutional objections.[8] Moreover, the Commission has sought to dismiss the concurrent litigation in state court for want of jurisdiction. See Affidavit in Support of Motion to Strike.[9] As the Court held in *Township of Hillsborough,* "In any event, there is such uncertainty concerning the New Jersey remedy as to make it speculative...." 326 U.S. at 625. Accord, *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 516-17 (1981); *Tully v. Griffin, Inc.,* 429 U.S. 68, 76 (1976). Any notion that a Mississippi court might award relief under these circumstances is speculative at best.

Nor do the appellants seek to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." They seek only to preserve the right of Claiborne County to collect its ad valorem tax from the owners of the property at Grand Gulf, as it has always done; whether the State also collects its in-lieu tax on that property is of no concern to them. The Fifth Circuit upheld the exercise of jurisdiction in a similar case "because it seeks not to inhibit the collection of taxes, but to require the collection of additional taxes." *Appling County v. Municipal Electric Authority of Georgia,* 621 F.2d 1301, 1303-04 (5th Cir. 1980). Accord, *Hargrove v. McKinney,* 413 F.2d 320, 326 (5th Cir. 1969), on remand, 313 F. Supp. 944 (M.D. Fla. 1970), reversed on other grounds *sub nom. Askew v. Hargrove,* 401 U.S. 476

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[8] The lack of a statutory remedy is sufficient to distinguish this case from *Bland v. McHann,* 463 F.2d 21 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1973). In that case, the District Court relied upon the availability of statutory procedures to seek a tax refund. *Id.*, at 28-29. Here, by contrast, the State Tax Commission has expressly refused to implement the procedures specifically governing the relief sought by the appellants, the return of Grand Gulf to the tax rolls.

[9] The appeal from the Chancery Court's dismissal of that litigation is now scheduled to be argued before the Supreme Court of Mississippi on July 16, 1987.

(1971). See also, *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1176-77 (9th Cir. 1984) (§1341 has no application because requested relief was directed at spending program rather than revenues); *Board of Education v. Bosworth,* 713 F.2d 1316, 1319-20 (7th Cir. 1983) (attempt to compel distribution of collected taxes in accordance with state law was not precluded by §1341).

The State has remarkably little to say with regard to the merits of the fifth and sixth questions presented by the Jurisdictional Statement. In denying that the legislature was motivated by discriminatory intent, the State says nothing to explain why the legislature acted as it did. Its citation, Mtn. at 27 n.23, to *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711 (1983), a Title VII case, is truly remarkable. In that case, this Court reaffirmed that a plaintiff may succeed by demonstrating that the defendants "proffered explanation is unworthy of credence." *Id.,* at 716, quoting *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981). The only explanations ever proffered by the State were thoroughly demolished by the evidence. J.S. at 24-25 n.28. Even the State was not so bold as to suggest that mere political clout, the basis finally accepted by the District Court, could serve to support these measures.

CONCLUSION

For the reasons stated herein and in the Jurisdictional Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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